Supreme Court, U.S.
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NO. 85-190 (3)

IN THE

# Supreme Court of the United States

OCTOBER TERM 1985

KELVIN DENNIE, Individually and
on behalf of his minor son, NKOSI,
*Petitioners*

*VS.*

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE
AND PRESBYTERIAN UNIVERSITY HOSPITAL,
AND NIEL WALD, M.D. AND JOHN DOE
*Respondents*

## PETITIONERS REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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*Petitioner, Pro Se*

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Under § 552a(g)(5) of the Privacy Act or any other section under subsection (g) is Niel Wald entitled to a claim of immunity for his constitutional violations of the Act.

2. Does the Federal Court in the United States Virgin Islands lack authority to hear and adjudicate this case even though complaint asserts a federal right and service of process was made in accordance with the provisions of Rule 4(d)(3) of F.R.C.P.

## LISTING OF PARTIES

Petitioners are:

Kelvin Dennie, individually and
on behalf of his minor son
Nkosi

Respondents are:

University of Pittsburgh School of Medicine
and Presbyterian University Hospital
and Niel Wald, M.D.
and John Doe

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## PETITIONERS REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully request that review of the decision of the District Court of the Virgin Islands, dated June 8, 1984 and affirmed by the Court of Appeals for the Third Circuit May 3, 1985 be granted.

## OPINION BELOW

The opinion of the District Court, dated June 8, 1984, reported at 589 F.Supp. 348, is reproduced in Appendix A of the petition for a writ of certiorari. The order of the Court of Appeals affirming this decision is reproduced in Appendix B of the petition for a wit of certiorari.

## STATEMENT OF JURISDICTION

The judgment of the District Court was entered June 8 1984. The order affirming the District Court was entered May 3, 1985. Petition for rehearing in banc was denied June 7, 1985. 28 USCS 1254 confers jurisdiction on this Court to review the judgment by writ of certiorari.

## STATEMENT OF THE CASE

On or about May 27, 1980 respondents solicited and did obtain petitioners informed consent to conduct *investigational research studies.* Information obtained from these studies were, in violation of federal law, released to defendants in a prior litigation. (civ. No. 177/1977 (D.C.V.I.) ). As a result, petitioner Nkosi Dennie was forced to relinquish his claim, and petitioner Kelvin Dennie was induced to compromise his cause and executed a release for a settlement much less than he believed he was entitiled to.

The present action stems from respondents unconstitutional acts. Petitioners claim is based upon the provisions of the Privacy Act and section 20.63 of Title 21 Code of Federal Regulations.

On June 8, 1984 after briefing and oral arguments the District Court dismissed the complaint for lack of personal jurisdiction ruling, the terms of the Privacy Act simply do not apply to individuals. Petitioners next filed motions for leave to amend complaint and for reconsideration of order dismissing same. Alleged in the amended complaint is that personal juridiction may be exercised where the complaint asserts a federal right and service of process was made in accordance with the provisions of Rule 4(d)(3) of F.R.C.P. The District Court nontheless determined it lacked authority to hear and adjudicate this case and the motions were denied. An appeal was then taken.

After briefing and oral arguments the United States Court of Appeals for the Third Circuit, on May 3, 1985, affirmed without opinion, the decision of the District Court. A petition for rehearing in banc was denied. Subsequently, a petition for writ of certiorari was filed July 8, 1985. A corrected petition was filed August 1, 1985.

## SUMMARY OF ARGUMENT

1. There are special and important reasons for discretionary review of this matter.

2. The second question presented does not lack clarity.

## ARGUMENT FOR GRANTING PETITION FOR A WRIT OF CERTIORARI

**Privacy Act – immunity**

The decision of the District Court concerning jurisdiction and liability under the Privacy Act is precedent. This is the first time a court in the United States has decided an individual, even for his constitutional violations of the Privacy Act, is not a proper defendant in a civil action.

Constitutional violations have never been sanctioned by this Court:

> "Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense." (*Butz v. Economou*, 438 US 478, 490-491)

To be entitled to a claim of immunity a defendant's conduct must not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (*Chocallo v. Bureau of Hearings and Appeals,* 548 F.Supp. 1349, 1366 - citing Harlow v. Fitzgerald, - US - 102 S.Ct. 2727, 73 L.Ed 2d 396 (1982) ).

It is very clear the District Court's decision conflicts with applicable decisions of this Court. Accordingly, respondents arguments based on said decision (Respondents' Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit, pgs. 5 & 6) show no grounds why this cause should not be reviewed by this Court.

**Privacy Act – personal jurisdiction**

> "An action to enforce any liability created under this section may be be brought in the District Court of the United States in the district in which the complaintant resides, or has his principal place of business, or in which the agency records are situated, **********. (5 USCS 552a(g)(5) - see Petition For Writ Of Certiorari, D-1 Appendix D)

Jurisdiction under the Privacy Act depends upon the liability of the defendant and not upon a showing that the defendant is a federal agency.

## THE SECOND QUESTION PRESENTED DOES NOT LACK CLARITY

Respondents have read into the petition arguments not presented therein. (Respondents Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit, pg. 7)

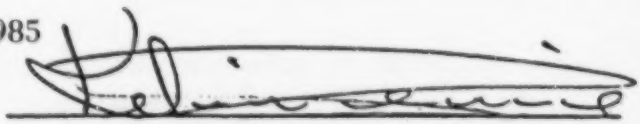
The second question presented concerns bases of personal jurisdiction (Petition For A Writ Of Certiorari, pgs. 3, 5-7). The Respondents failed to address these substantive arguments of personal jurisdiction and their failure to do so is not due to a lack of clarity. It is evident that review is sought on the District Court's decision that it lacked authority to hear and adjudicate this case.

The petition does not lack clarity. Accordingly, Respondents reliance on Supreme Court Rule 21.5 as a basis for denying the petition is not well founded.

## CONCLUSION

For all the foregoing reasons review by this Court should be granted.

DATED: August 30, 1985



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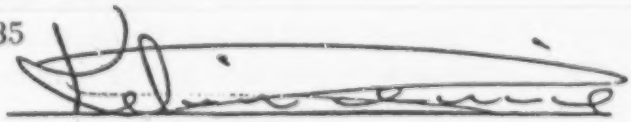
## CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument were forwarded certified mail to Vincent A. Colianni, Esq., 46 King Street, Christiansted, St. Croix, USVI 00820, and also to Wilbur McCoy Otto and Ingrid M. Lundberg, Dickie, McCamey & Chilcote, Two PPG Place, Suite 400, Pittsburgh, Pa. 15222-5402.

DATED: August 30, 1985



Kelvin Dennie

# Appendix A

## Federal Privacy Act

**5 USCS 552a(g)(5) – Venue**

An action to enforce any liability created under this section may be brought in the District Court of the United States in the district in which the complaintant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

**Rule 4(d)(3), Fed. Rule of Civ. P.**
**Summons: Personal Service**

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

Upon a domestic or foreign corporation or upon a partnersip or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and, the statute so requires, by also mailing a copy to the defendant.